construction of the constitution, the task which the Court is called upon to perform is to lay down that rule which, in the long run, will be most beneficial to the country. A certain amount of experimenting is sometimes necessary, before the most satisfactory rule is discovered, and even then, modifications may from time to time be required. But this is not judicial legislation, but only an intelligent molding of judicial doctrine, so that it may more perfectly conform to the spirit of the times.

FRANCIS COPE HARTSHORNE.

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## LEGAL NOTES.

### CONSULAR COURTS.

The case of *In re Ross*, decided by the Supreme Court of the United States, on May 25th, presented an entirely novel question in constitutional law, though one that involved the validity of Acts of Congress which have been long acquiesced in without question by the Legislative and Executive Departments of our Government. The case was an appeal from a judgment of the Circuit Court of the Northern District of New York, refusing an application for a writ of *habeas corpus*.

The facts were as follows: In May, 1880, John M. Ross, a seaman on board an American ship then lying in the harbor of Yokohama, Japan, killed one Robert Kelly, the second mate of the ship. He was at once arrested and confined in jail at Yokohama. On May 10th the master of the ship filed with the American Consul General a complaint against Ross, and, on the 18th, an amended complaint. On the 20th of the same month Ross was convicted, and sentenced to be hanged "at such time and place as the United States Minister to Japan may direct, according to law." The United States Minister, Mr. Bingham, on May 22d, approved the proceedings, verdict and sentence. He then submitted the records to the Department of State, for the President's consideration. The President commuted the sentence to imprisonment for life in the Albany Penitentiary, in the State of New York.

One of the grounds on which the counsel for the prisoner applied for the writ was because "The refusal to allow the accused a trial by jury was a fatal defect in the jurisdiction exercised by the Court, and renders its judgment absolutely void.

"*First.*—The jury contemplated by the Constitution (Art. 3, No. 2, sub. 3; Amendments, Art. 6), and demanded by the appellant, is a common law jury of twelve men.

"*Second.*—There appears to be nothing in the legislation of Congress relating to the exercise of this Consular jurisdiction to preclude compliance with the constitutional requirement."

The Treaty of June 17th, 1857, executed by the Consul-General of the United States and the Governors of Simoda, is the one which first conceded to the American Consul at Japan authority to try Americans committing offences in that country.

Article 4, of that treaty, is as follows:

Article 4.—"Americans committing offences in Japan shall be tried by the American Consul General or Consul, and shall be punished according to Amer-

ican laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws." 11 Stat. 723.

The Treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American Consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth Article is as follows:

Article 6.—"Americans committing offences against Japanese shall be tried in American Consular Courts, and when guilty shall be punished according to American law. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The Consular Courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese Courts shall in like manner be open to American citizens for the recovery of their just claims against the Japanese." 12 Stat. 1056.

Article 12.—"Such of the provisions of the treaty made by Commodore Perry, and signed at Kanagawa on the 31st of March, 1854, as conflict with the provisions of this treaty, are hereby revoked; and as all the provisions of a convention executed by the Consul General of the United States and the Governors of Simoda, on the 17th of June, 1857, are incorporated in this treaty; that convention is also revoked."

The legislation of Congress to carry out the above provisions of the treaty is found in the Revised Statutes of the United States, as follows:

Sec. 4083. "To carry into full effect the provisions of the treaties of the United States with China, Japan, Siam, Egypt and Madagascar, respectively, the minister and the consuls of the United States, duly appointed to reside in each of those countries, shall, in addition to other powers and duties imposed upon them, respectively, by the provisions of such treaties, respectively, be invested with the judicial authority herein described, which shall appertain to the office of minister and consul, and be a part of the duties belonging thereto, wherein, and so far as, the same is allowed by treaty.

Sec. 4084. "The officers mentioned in the preceding section are fully empowered to arraign and try, in the manner herein provided, all citizens of the United States charged with offenses against law, committed in such countries, respectively, and to sentence such offenders in the manner herein authorized; and each of them is authorized to issue all such processes as are suitable and necessary to carry this authority into execution.

Sec. 4086. "Jurisdiction in both criminal and civil matters shall, in all cases, be exercised and enforced in conformity with the laws of the United States, which are hereby, so far as is necessary to execute such treaties respectively, and so far as they are suitable to carry the same into effect, extended over all citizens of the United States in those countries, and over all others to the extent that the terms of the treaties, respectively, justify or require. But in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others in those countries; and if neither the common law, nor the law of equity or of admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies,

the ministers in those countries, respectively, shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies.

Sec. 4087. "Each of the consuls mentioned in section forty hundred and eighty-three, at the port for which he is appointed, is authorized upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offense against law; and to arraign and try any such offender; and to sentence him to punishment in the manner herein prescribed.

Sec. 4102. "Insurrection or rebellion against the government of either of those countries, with intent to subvert the same, and murder, shall be capital offenses, punishable with death; but no person shall be convicted of either of those crimes, unless the consul and his associates in the trial all concur in opinion, and the minister also approves of the conviction. But it shall be lawful to convict one put upon trial for either of these crimes, of a less offence of a similar character, if the evidence justifies it and to punish, as for other offences, by fine or imprisonment, or both.

Sec. 4106. "Whenever, in any case, the consul is of opinion that by reason of the legal questions which may arise therein, assistance will be useful to him, or whenever he is of the opinion that severer punishments than those specified in the preceding sections will be required, he shall summon to sit with him on the trial, one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which had previously been submitted to and approved by the minister, and shall be persons of good repute and competent for the duty. Every such associate shall enter upon the record his judgment and opinion, and shall sign the same; but the consul shall give the judgment in the case. If the consul and his associates concur in opinion, the decision shall, in all cases, except of capital offences, and except as provided in the preceding section, be final. If any of the associates differ in opinion from the consul, the case, without further proceedings, together with the evidence and opinions, shall be referred to the minister for his adjudication, either by entering up judgment therein, or by remitting the same to the consul with instructions how to proceed therewith.

The question whether Congress outside the ordinary territorial limit ot the United States can prescribe a mode of trial other than a trial by jury after an indictment was thus brought fairly before the Court. On this head Mr. Justice Field, in delivering the opinion, says: "We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue acusation or an unfair trial secured by the Constitution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of this kind has there been any attempt to require indictment by a Grand Jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on

that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes except by indictment or presentment by Grand Jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. *Cook* vs. *United States*, 138 U. S., 157, 181. The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States: And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with judicial authority, would be impracticable from the impossibility of obtaining a competent Grand or Petit Jury. The requirement of such a body to accuse and to try an offender would in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer in being withdrawn from the proceedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture." The learned Judge cites: Letter of Mr. Cushing to Mr. Calhoun, of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Exterritorial Rights, by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations, of April 29, 1882, Senate Doc., 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41.

### AN ORIGINAL PACKAGE HOUSE.

The nature of an Original Package has lately received judicical interpretation in the Supreme Court of Iowa as follows:

*State* v. *Coonan*. Supreme Court of Iowa, decided, May 13th, 1891.

Opinion by ROTHROCK, J.:

"The defendant was the keeper of what was known as an 'original package house,' at Spencer, in Clay county. He was not the owner of the packages of liquor which he kept for sale. He was the agent of certain parties in Milwaukee,

Wis. These parties were lessees of the building, and the same was occupied by the defendant as their agent. They shipped the liquors kept for sale in said building from Milwaukee to Spencer, Iowa, consigned to themselves; and the defendant received them as the agent of said Milwaukee parties. The beer which kept for sale was put up in bottles at Milwaukee, sealed and labeled, and for convenience of shipment were placed in open frame boxes with twenty-four separate compartments. The whiskey was in bottles, sealed and labeled, which bottles were, for convenience of shipment, packed in barrels. The defendant removed the bottles from the boxes and barrels, and sold them as they were sealed and labeled, and purchasers were not permitted to open the bottles and use the liquor upon the premises. As we understand it, this was strictly an original package establishment, and was authorized by the decision of the Supreme Court of the United States in *Leisy* v. *Hardin*, 135 U. S. 100. That the separate bottles were original packages—that is, in the form in which they were put up by the shipper for sale—we think there can be no doubt. At least such has been the holding of this Court. *Collins* v. *Hills*, 77 Iowa, 181. And see also, *Re Beine*, 42 Fed. Rep., 545. It is proper to observe that the case at bar was heard and determined in the Court below before the recent Act of Congress relating to the laws of the several States pertaining to the regulation or prohibition of the traffic in intoxicating liquors.

"The decree of the District Court will be reversed."

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## ABSTRACTS OF DECISIONS

### INJURY—MEASURE OF DAMAGES.

Action of one Charles Baker and wife for injuries to the latter while a passenger on defendant's railroad. It was shown on the trial that, as a consequence of her injuries, the woman had suffered great pain. The Judge charged the jury that it was their duty "to fix some sum which would be a compensation for this pain and suffering." Held error. The Court per Williams, Judge, said, "There is no market standard of value to be applied, and to suggest the idea of price to be paid to a volunteer as an approximation to the money value of the suffering is to give a loose rein to sympathy and caprice."

*Baker* v. *Pennsylvania Co.* Supreme Court of Pennsylvania. Appeal from the Court of Common Pleas, of Erie County. Decided May 25, 1891.

### WILLS—CONSTRUCTION.

A. made her will in January, 1847, as follows: "All my estate, both real and personal, that I shall inherit as my portion after my father's death, I give and bequeath to my beloved cousin," etc.

The testatrix's mother died intestate in 1840, seized of certain real estate which descended to her children, subject to the life estate of her husband, who died in 1868. Held, reversing the decision of the Court below, that the word "inherit" had not been used by the testatrix in its technical sense, but in the sense of "to become possessed of," and therefore she did not die intestate as to any real or personal estate into possession of which she had come as a result of her father's death.